(4)

No. 04-640

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

In The Supreme Court of the United States

1690 COBB L.L.C. d/b/a WATERPIPE WORLD, and ERIK CLABAUGH

and

INSERECTION, A FANTASY STORE, and ERIK CLABAUGH,

Petitioners,

v.

THE CITY OF MARIETTA, BILL DUNAWAY, In his official capacity as Mayor of THE CITY OF MARIETTA, BETTY L. HUNTER, PETE WALDREP, JOHNNY SINCLAIR, ANDY MORRIS, ANTHONY COLEMAN, JIM KING, And PHILIP GOLDSTEIN, In their official capacity as Members of THE MARIETTA CITY COUNCIL

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY TO BRIEF IN OPPOSITION

Paul J. Cambria, Jr.
Counsel of Record
Roger W. Wilcox, Jr.
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

Counsel for Petitioners

THE LEX GROUP ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

RESPONDENTS' FACTUAL MISREPRESENTATIONS 1

I. Respondents Err in Describing the Fact Basis of the Cobb County Superior Court's Affirmance of the City of Marietta's Revocation of Petitioners' Business Licenses. 1

II. Respondents' Erroneously Represent that there are No Constitutional Issues or Questions of Federal Law Pending in this Case. 3

III. Respondent's Improperly Assert Rule 15.2 to Suggest Petitioners Set Forth Incorrect Facts. 4

REASONS FOR GRANTING THE PETITION 5

I. The City of Marietta Cannot Lawfully Condition the Issuance of Business Licenses on Compliance with Restrictions that Violate Petitioners' Constitutional Rights. 5

II. *Lawrence v. Texas* Requires that Georgia's Ban on the Dissemination of Sexual Devices Be Struck Down on the Ground that the Prohibition Violates the Guarantees of the Substantive Due Process Clause of the Fourteenth Amendment 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases:

Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr,
518 U.S. 668, 116 S. Ct. 2342 (1996) 6

Carey v. Population Services,
431 U.S. 678, 97 S. Ct. 2010 (1977) 8

Inserection v. City of Marietta,
278 Ga. 170, 598 S.E.2d 452 (2004) 3, 4

Lawrence v. Texas,
539 U.S. 558, 123 S. Ct. 2472 (2003) ..... *passim*

Williams v. Attorney General of Alabama,
378 F.3d 1232 (2004) 7, 8

Constitutional Provisions:

U.S. CONST. amend. I 9

U.S. CONST. amend. XIV ..... *passim*

Statutes:

O.C.G.A. § 16-12-80 3

O.C.G.A. § 16-12-80(c) 3, 5

Rule:

Sup. Ct. R. 15.2 4

INTRODUCTION

Petitioners submit this reply brief to counter certain factual errors set forth in respondents' Brief in Opposition. On the basis of a faulty representation of the proceedings below, respondents would have this Court deny the requested writ of certiorari to the Supreme Court of Georgia, thereby depriving petitioners of an opportunity to convince the Court on the merits that its decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), means that the State of Georgia's ban on the dissemination of sexual devices to adults violates petitioners' substantive due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution. A correct view of the pertinent facts reveals that this is a procedurally and substantively appropriate case for the Court's determination of this important national issue.

RESPONDENTS' FACTUAL MISREPRESENTATIONS

I. Respondents Err in Describing the Fact Basis of the Cobb County Superior Court's Affirmance of the City of Marietta's Revocation of Petitioners' Business Licenses.

Without citing the appendix or offering any additional documentary support for their claims, respondents contend that the Cobb County Superior Court (Ingram, J.) made factual findings in denying petitioners' Petition for a Writ of Mandamus and Writ of Certiorari that provide grounds that would allow this Court to avoid reaching the constitutional issues presented on the instant petition. See page 2 of

respondents' Brief on Appeal. Review of Judge Ingram's decision, however, establishes that the Superior Court did not base its decision on the grounds claimed by respondents.

First, the Superior Court did not affirm the City of Marietta's revocation of petitioners' business licenses on the ground that petitioners sold items that constituted a public nuisance. Moreover, the Superior Court did not make factual findings with respect to how much of petitioners' floor space was used for the sale of sexually oriented items.

Rather, the Superior Court rejected petitioners' various federal and state constitutional challenges—including a violation of petitioners' substantive due process rights to privacy and liberty under the Fourteenth Amendment and *Lawrence v. Texas, supra* (A 30-31, 49-50), on three precise grounds:

1. The sex toys and other evidence in this case violate the written conditions of the license;

2. The sex toys and other evidence in this case violate the adult entertainment code of the City of Marietta as referenced in the license; and

> 3. The sex toys and other evidence in this case constitute an obscenity under O.C.G.A. § 16-12-80(c) and that the sale of such items is unlawful under O.C.G.A. § 16-12-80.

(A 9-10).

Thus, it is indisputable that petitioners' substantive due process challenge to the State of Georgia's ban on the dissemination of sexual devices to adults was the central dispute in the state courts below, and there is no non-constitutional reason justifying avoidance of the important privacy rights question put squarely to this Court by petitioners.

II. Respondents' Erroneously Represent that there are No Constitutional Issues or Questions of Federal Law Pending in this Case.

Citing the Georgia Supreme Court's decision that petitioner Inserection, A Fantasy Store's interlocutory appeal from the granting of a temporary injunction against it in a separate case was moot, respondents contend that, consequently, there are no constitutional issues or questions of federal law pending in this case. Respondents' argument is without basis in law or fact.

In *Inserection v. City of Marietta*, 278 Ga. 170, 598 S.E.2d 452 (2004), the Georgia Supreme Court ruled that Inserection's interlocutory appeal from the order of the Cobb County Superior Court granting a temporary injunction against its operation during a separate lawsuit brought by the City to permanently enjoin the

store's operation was moot because the store's business license had expired during the course of the litigation. *Id.* at 171, 598 S.E.2d 452. This interlocutory appeal is entirely distinct from petitioners' later filed Petitions for Writ of Mandamus and Writ of Certiorari (A 24-33, 43-51), which are the subjects of the petition currently before the Court. Since the decisions of the Cobb County Superior Court that petitioners ask this Court to review directly addressed and rejected the constitutional arguments raised in this petition for a writ of certiorari to the Supreme Court of Georgia, there can be no dispute that petitioners' claims are live—particularly the central contention that Georgia's ban on the dissemination of sexual devices violates the Due Process Clause of the Fourteenth Amendment.

III. Respondent's Improperly Assert Rule 15.2 to Suggest Petitioners Set Forth Incorrect Facts.

At page 6 of their Brief in Opposition, respondents' misrepresent to the Court that petitioners' contention that this case involves "alleged criminal violations" and "past violations of law," is untrue. Respondents assert that petitioners' statements "are factual inaccuracies as there have been no alleged criminal law violations at any level in this case nor were the Petitioners' business licenses revoked due to alleged criminal law violations." Respondents' claims are patently untrue.

Review of the appendix submitted to this Court unequivocally demonstrates that petitioners' description of the state of facts below was entirely accurate. For instance, the City of Marietta revoked the business

license of petitioner Inserection Water Pipe World in a letter dated June 23, 2003, that can be found at pages 36-39 of the appendix. Quite contrary to respondents' claim of error, the City's business license manager found that petitioner's sale of sexual devices violated the ordinances of Marietta and, further, "that the evidence and the sale of the items introduced into evidence upon and within the licensed premises constitute a violation of the criminal laws of the State of Georgia, including O.C.G.A. § 16-12-80(c)" (A 38-39). Identical findings are set forth in the license revocation letter sent to petitioner Inserection A Fantasy Store (A 57).

Accordingly, respondents cannot reasonably contend that this case does not involve the alleged violations of law—particularly of the Georgia sexual device ban—that inarguably lie at the heart of this case. It is not entirely clear why respondents would maintain a contrary position, but if their intention was to suggest a jurisdictional deficiency, such an assertion is readily disproved by the record documents set forth in the appendix.

REASONS FOR GRANTING THE PETITION

I. The City of Marietta Cannot Lawfully Condition the Issuance of Business Licenses on Compliance with Restrictions that Violate Petitioners' Constitutional Rights.

In their Brief in Opposition, respondents repeatedly argue that no constitutional issues are presented on this petition merely because the City refused to issue business licenses to petitioners unless

they agreed to comply with the requirement that the stores refrain from selling sexual devices (see Brief in Opposition at pp. 4-5, 14-15). Respondents characterize this as "waiver by contract." Petitioners call it holding constitutional rights hostage to illicit government intentions.

Government officials cannot limit the enjoyment of federal constitutional rights by the imposition of unconstitutional conditions. See, e.g., *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 674-75, 116 S. Ct. 2342 (1996). The imposition of an unconstitutional condition that requires a licensee to abandon privacy and liberty rights guaranteed by the Due Process Clause of the Fourteenth Amendment in order to do business in the City of Marietta is condemnable in every respect. The mere fact that respondents believe they have the power as government officials to force petitioners to give up certain of their civil rights in order to do business in Marietta is reason enough to grant the writ of certiorari sought by petitioners.

II. *Lawrence v. Texas* Requires that Georgia's Ban on the Dissemination of Sexual Devices Be Struck Down on the Ground that the Prohibition Violates the Guarantees of the Substantive Due Process Clause of the Fourteenth Amendment.

Despite even the acknowledgment of Justice Scalia that the majority in *Lawrence v. Texas* had interpreted the Due Process Clause to provide for a level of personal privacy with respect to sexual issues that

"effectively decrees the end to all morals legislation," *Id.* at 599, 123 S. Ct. 2472, respondents maintain that this important decision did not create recognize such a fundamental liberty interest. Petitioners respectfully submit that respondents' argument conveniently ignores the Court's powerful language declaring a limitation on the State's interference with a whole range of personal decisions, including those involving concerns outside the home: "And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Lawrence v. Texas,* 539 U.S. at 562, 123 S. Ct. 2472. In reliance on the Eleventh Circuit's decision in *Williams v. Attorney General of Alabama,* 378 F.3d 1232 (2004), respondents dismiss the *Lawrence* Court's enunciation of an expansive privacy right favoring personal choice, particularly in sexual matters, simply because the Court's constitutional rights analysis in *Lawrence v. Texas* did not follow an evaluative path that the Eleventh Circuit prefers. Notably, respondents avoid confronting the actual language used by the majority in *Lawrence v. Texas, supra,* seeking refuge from the obvious import of the *Lawrence* Court's recognition of substantive due process privacy protections by focusing instead on analytical process criticisms that ignore the magnitude of the majority's ruling.

Because *Williams* was wrongly decided by virtue of the Eleventh Circuit's unwarranted focus on particular sex acts instead of the larger question decided by *Lawrence v. Texas*—the right of Americans to be left

alone when it comes to what goes on in their bedrooms—respondents' reliance on the decision similarly misses the mark. Indeed, the potential that the *Williams* analysis may undermine the true intent of this Court in *Lawrence v. Texas, supra,* provides an additional reason to grant the writ of certiorari requested by petitioners.

Furthermore, respondents' assertion that, even if the Due Process Law guarantees a right of sexual privacy, the State of Georgia may still ban petitioners' dissemination of sexual devices that citizens are permitted to individually possess, is inherently flawed. As this Court pointed out in *Carey v. Population Services,* 431 U.S. 678, 97 S. Ct. 2010 (1977), prohibiting the commercial distribution of items Americans may lawfully possess is simply another form of a ban:

> Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use.

Id. at 687-88, 97 S. Ct. 2010 (citation omitted).

Similarly, in the instant case Georgia's prohibition of sales of sexual devices to consenting adults for use in private is as harsh as a direct ban on their possession and use. Moreover, as the *Carey* Court also recognized, a ban on dissemination of an item may actually be easier

to enforce than a prohibition of personal possession and use, thereby even more assuredly limiting or eliminating the personal right. Such a result simply cannot be countenanced by this Court in light of *Lawrence v. Texas*.

CONCLUSION

Petitioners respectfully submit that the Court should grant their petition for a writ of certiorari to the Supreme Court of Georgia so that they may have a full and fair opportunity to vindicate their rights to privacy and liberty under the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

Paul John Cambria, Jr., Esq.
Counsel of Record
Lipsitz, Green, Fahringer, Roll,
Salisbury & Cambria LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849 -1333

Of Counsel:
Roger W. Wilcox, Jr., Esq.